

117TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To amend the Securities Exchange Act of 1934 to require the Securities and Exchange Commission to require, by rule, the contractual provision by large issuers of procedural privileges with respect to certain shareholder claims relating to board and management accountability for “woke” social policy actions as a condition of listing on a national securities exchange, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

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Mr. RUBIO introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

To amend the Securities Exchange Act of 1934 to require the Securities and Exchange Commission to require, by rule, the contractual provision by large issuers of procedural privileges with respect to certain shareholder claims relating to board and management accountability for “woke” social policy actions as a condition of listing on a national securities exchange, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Mind Your Own Busi-  
3 ness Act of 2021”.

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) The fiduciary duties of board of directors or  
7 other corporate actors to corporations and their  
8 stockholders are generally established by and en-  
9 forceable under State law.

10 (2) State law generally permits corporations  
11 discretion with respect to altering the rights of the  
12 stockholders of the corporation, including the proc-  
13 ess by which stockholders assert claims for breach of  
14 fiduciary duties by the board of directors or other  
15 actors of that corporation, limited by State law gov-  
16 erning these fiduciary duties.

17 (3) The regulation of corporations as issuers of  
18 securities authorized by Congress through the Secu-  
19 rities Exchange Act of 1934 (15 U.S.C. 78a et seq.)  
20 generally affects corporate behavior in connection  
21 with the issuance of securities, including with re-  
22 spect to contractual arrangements between corpora-  
23 tions and their stockholders via provisions in cor-  
24 porations’ charters and bylaws, and does not—

25 (A) establish fiduciary duties of boards of  
26 directors or other corporate actors to corpora-

1           tions and their stockholders under Federal law,  
2           or

3                   (B) regulate the fiduciary duties of boards  
4           of directors or other corporate actors to cor-  
5           porations and their stockholders under State  
6           law.

7           (4) The State law fiduciary duties of boards of  
8           directors and other corporate actors establish certain  
9           norms upon which the national market system for  
10          securities has historically relied, including—

11                   (A) boards of directors and other corporate  
12          actors of issuers generally have fiduciary duties  
13          to their respective corporations and its stock-  
14          holders, and

15                   (B) the behavior of corporations as issuers  
16          of securities will generally conform to these fi-  
17          duciary duties, to the benefit of the protection  
18          of investors and the public interest.

19          (5) Other norms related to the public interest  
20          have historically provided critical bases upon which  
21          the national market system for securities has histori-  
22          cally relied, including norms that large corporate  
23          issuers that are significant to the national econ-  
24          omy—

1 (A) generally invest corporate resources to  
2 increase the long-term value of the corporation  
3 as a business rather than as an agent of social  
4 change;

5 (B) do not use corporate resources to ad-  
6 vance narrowly political or partisan agendas;  
7 and

8 (C) do not use corporate resources to pro-  
9 mote socialism, Marxism, critical race theory, or  
10 other un-American ideologies among their  
11 workforces or customers;

12 (6) Though these norms are not enforceable  
13 legal duties of boards of directors or other corporate  
14 actors under Federal law, they substantially con-  
15 tribute to the commercial purpose and nationwide  
16 availability of the national market system for securi-  
17 ties, which are recognized by section 2 of the Securi-  
18 ties Exchange Act of 1934 (15 U.S.C. 78b) as prin-  
19 cipal bases for the regulation authorized by that Act.

20 (7) Certain large corporate issuers that are sig-  
21 nificant to the national economy have recently un-  
22 dertaken actions which facially violate these norms  
23 on account of apparent political bias. Examples of  
24 such actions include the use of corporate resources  
25 to—

1           (A) deny goods and services to States and  
2           their political subdivisions, and private entities  
3           within such States and their political subdivi-  
4           sions, in response to the social policies proposed  
5           or enacted in such States and their political  
6           subdivisions, including those related to election  
7           procedures, restrictions on abortion, protections  
8           for religious freedom, and enforcement of immi-  
9           gration law;

10           (B) deny goods and services to industries  
11           and other classes of entities on the basis of  
12           characteristics of those industries and classes  
13           related to social policy, including industries in-  
14           volved in the sale or manufacture of firearms,  
15           operation of border security or criminal deten-  
16           tion facilities, and performance of services for  
17           the United States military, and classes of enti-  
18           ties based on religious belief or identity; and

19           (C) promote race and sex stereotyping,  
20           such as those described in section 2(a) of Exec-  
21           utive Order 13950 (5 U.S.C. 4103 note; relat-  
22           ing to combating race and sex stereotyping),  
23           which include such destructive concepts that the  
24           United States is fundamentally racist or sexist,  
25           an individual should be discriminated against or

1 receive adverse treatment solely or partly be-  
2 cause of his or her race or sex, and meritocracy  
3 or traits such as a hard work ethic are racist  
4 or sexist, or were created by a particular race  
5 to oppress another race; and

6 (D) openly coordinate with political actors  
7 to pursue such actions, including—

8 (i) undertaking such actions upon the  
9 action (or inaction) of boards of directors  
10 and other corporate actors that are not  
11 sufficiently independent from conflicts of  
12 interests with political actors, including  
13 elected officials, political parties, news  
14 media, labor unions, nonprofit or non-gov-  
15 ernmental organizations which advocate for  
16 changes political or social policy through  
17 issuers, other activists affiliated with such  
18 actors, and activist investors which advo-  
19 cate for changes in corporate policy pri-  
20 marily unrelated to the pecuniary interest  
21 of the issuer; and

22 (ii) conceding to the demands of such  
23 political actors without undertaking due  
24 care.

1           (8) The prominent, open, and public facial vio-  
2           lation of these norms by large corporate issuers that  
3           are significant to the national economy undermine  
4           the commercial purpose and nationwide availability  
5           of the national market system for securities by  
6           spending corporate resources on non-commercial and  
7           divisive, political and partisan causes.

8           (9) The threat these actions pose to the na-  
9           tional market system for securities establishes a  
10          public interest in ensuring large corporate issuers  
11          that are significant to the national economy have  
12          adequate internal procedural mechanisms to ensure  
13          the accountability of those issuers with respect to  
14          their adherence with the norms described in this sec-  
15          tion, and do not unduly burden the ability of stock-  
16          holders to assert claims for breach of fiduciary duty  
17          under State law where the action at issue facially  
18          violates those norms.

19 **SEC. 3. LISTING REQUIREMENT RELATING TO PROCE-**  
20 **DURAL PRIVILEGES FOR CERTAIN SHARE-**  
21 **HOLDER CLAIMS.**

22          The Securities Exchange Act of 1934 (15 U.S.C. 78a  
23 et seq.) is amended by inserting after section 10D (15  
24 U.S.C. 78j-4) the following:

1 **“SEC. 10E. PROCEDURAL PRIVILEGES FOR CERTAIN**  
2 **SHAREHOLDER CLAIMS.**

3 “(a) DEFINITIONS.—In this section:

4 “(1) CLAIMANT.—The term ‘claimant’ means—

5 “(A) a person that brings a covered claim;

6 or

7 “(B) if a covered claim is brought as a  
8 class action, the representative of the class in  
9 that action.

10 “(2) CONTROLLER.—The term ‘controller’  
11 means any person or entity that has control, directly  
12 or indirectly, by any means (as those terms are de-  
13 fined under applicable State law), over the board of  
14 directors of an issuer, either—

15 “(A) generally; or

16 “(B) with respect to an action at issue in  
17 a covered claim.

18 “(3) COVERED CLAIM.—The term ‘covered  
19 claim’—

20 “(A) means any single cause of action  
21 that—

22 “(i) asserts a claim for breach of fidu-  
23 ciary duty owed by any corporate defend-  
24 ant to the applicable issuer (or the share-  
25 holders of the applicable issuer) resulting  
26 from material action by any covered cor-

1           porate actor with respect to the applicable  
2           issuer—

3                           “(I) that is taken primarily in re-  
4                           sponse to a law (including a regula-  
5                           tion) that is enacted by a State, or a  
6                           bill that is introduced in the legisla-  
7                           ture of a State or policy otherwise  
8                           publicly proposed by an elected official  
9                           of a State, which shall include if such  
10                          action includes any prohibition of  
11                          business within that State by an  
12                          issuer, whether with respect to busi-  
13                          ness services or travel to, or major  
14                          events in, that State, that is facially  
15                          unrelated to the pecuniary interest of  
16                          the applicable issuer, which shall pre-  
17                          sumptively include if the law bill, or  
18                          policy would modify, establish, or cre-  
19                          ate a law relating to—

20   “(aa) the manner in which  
21   elections are conducted in the  
22   State;

23   “(bb) protecting religious  
24   freedom; or

1                   “(cc) limiting the availability  
2                   of services that include the abor-  
3                   tion of unborn children;

4                   “(II) to prohibit the sale of goods  
5                   or services by any covered corporate  
6                   actor with respect to the applicable  
7                   issuer to any class of customers pri-  
8                   marily on the basis of a characteristic  
9                   of that class that is facially unrelated  
10                  to the pecuniary interest of the appli-  
11                  cable issuer;

12                  “(III) to promote a covered divi-  
13                  sive concept; or

14                  “(IV) for which the reasoning  
15                  publicly presented by any covered cor-  
16                  porate actor with respect to the appli-  
17                  cable issuer as—

18                         “(aa) any basis for such ac-  
19                         tion promotes a covered divisive  
20                         concept; or

21                         “(bb) the primary basis for  
22                         such action is facially unrelated  
23                         to the pecuniary interest of the  
24                         applicable issuer, which shall pre-  
25                         sumptively include any reference

1 to diversity, equity, or inclusion  
2 with respect to the composition  
3 of the workforce, management, or  
4 board of directors of the issuer or  
5 society in general; and

6 “(ii) is brought by a covered share-  
7 holder as—

8 “(I) a direct action; or

9 “(II) a derivative action or pro-  
10 ceeding brought on behalf of the ap-  
11 plicable issuer; and

12 “(B) does not include a cause of action  
13 that asserts a claim for any breach of fiduciary  
14 duty owed by any corporate defendant to the  
15 applicable issuer (or the shareholders of that  
16 issuer) resulting from any—

17 “(i) charitable contribution by any  
18 covered corporate actor with respect to the  
19 applicable issuer;

20 “(ii) exercise of religion by any cov-  
21 ered corporate actor with respect to the  
22 applicable issuer;

23 “(iii) business activity by any covered  
24 corporate actor in connection with the na-  
25 tional security of the United States, the

1 Armed Forces, or veterans of the Armed  
2 Forces; or

3 “(iv) limitation of business by any  
4 covered corporate actor with respect to the  
5 applicable issuer—

6 “(I) occurring in the jurisdiction  
7 of, or with an agent of the People’s  
8 Republic of China, the Russian Fed-  
9 eration, North Korea, Iran, Syria,  
10 Sudan, Venezuela, or Cuba;

11 “(II) with any entity that en-  
12 gages in a commerce- or investment-  
13 related boycott, divestment, or sanc-  
14 tions activity that targets Israel; or

15 “(III) that is required under  
16 Federal, State, or local law.

17 “(4) COVERED COMPANY.—The term ‘covered  
18 company’ means an issuer that has, as calculated in  
19 accordance with section 240.12b–2 of title 17, Code  
20 of Federal Regulations, or any successor regula-  
21 tion—

22 “(A) a public float of more than  
23 \$20,000,000,000; or

24 “(B) annual revenues of more than  
25 \$1,000,000,000.

1           “(5) COVERED CORPORATE ACTOR.—The term  
2           ‘covered corporate actor’ means—

3                   “(A) an issuer;

4                   “(B) a director, officer, or affiliate of an  
5           issuer;

6                   “(C) a controller with respect to an issuer;

7           or

8                   “(D) any person acting in the capacity of  
9           an officer or agent of an issuer.

10           “(6) CORPORATE DEFENDANT.—The term ‘cor-  
11           porate defendant’ means any individual who—

12                   “(A) is a director, officer, affiliate of an  
13           issuer, or controller; and

14                   “(B) may be named as a defendant in a  
15           cause of action for breach of fiduciary duty  
16           under applicable State law.

17           “(7) COVERED DIVISIVE CONCEPT.—The term  
18           ‘covered divisive concept’ means any concept de-  
19           scribed in section 2(a) of Executive Order 13950 (5  
20           U.S.C. 4103 note; relating to combating race and  
21           sex stereotyping).

22           “(8) COVERED SHAREHOLDER.—

23                   “(A) IN GENERAL.—The term ‘covered  
24           shareholder’ means a shareholder that as of the  
25           date on which a covered claim with respect to

1 the issuer is filed and at all times during which  
2 the covered claim described in subparagraph  
3 (A) is pending have continuously owned not less  
4 than—

5 “(i) \$2,000 in market value of the  
6 issuer’s securities for at least three years;  
7 or

8 “(ii) \$15,000 in market value of the  
9 issuer’s securities for at least two years; or

10 “(iii) \$25,000 in market value of the  
11 issuer’s securities for at least one year;

12 “(9) DIRECTOR.—The term ‘director’ means,  
13 with respect to an issuer, a member of the board of  
14 directors of the issuer.

15 “(10) INVESTMENT ADVISER; PRIVATE FUND.—  
16 The terms ‘investment adviser’ and ‘private fund’  
17 have the meanings given the terms in section 202 of  
18 the Investment Advisers Act of 1940 (15 U.S.C.  
19 80b–2).

20 “(11) INVESTMENT COMPANY.—The term ‘in-  
21 vestment company’ has the meaning given the term  
22 in section 3 of the Investment Company Act of 1940  
23 (15 U.S.C. 80a–3).

1           “(12) ISSUER.—The term ‘issuer’ means an  
2 issuer with a class of securities registered pursuant  
3 to section 12.

4           “(13) NON-PECUNIARY INVESTMENT ENTITY.—  
5 The term ‘non-pecuniary investment entity’ means—

6           “(A) any investment company or private  
7 fund that invests, reinvests, or trades, or pro-  
8 poses to invest, reinvest, or trade in, or that ex-  
9 ercises any control right with respect to any se-  
10 curity primarily on a basis that is facially unre-  
11 lated to the pecuniary interest of any bene-  
12 ficiary of such company or fund for which such  
13 activity occurs with respect to such security;

14           “(B) any investment advisor that provides  
15 any advice that is not a charitable contribu-  
16 tion—

17           “(i) that is for compensation; and

18           “(ii) the basis for which is primarily  
19 unrelated to the pecuniary interest of the  
20 party receiving the advice;

21           “(C) any entity that engages in activism  
22 with respect to issuers to which section 14 ap-  
23 plies for which the primary basis of such activ-  
24 ism is facially unrelated to the pecuniary inter-

1 est of the issuers to which such activism is di-  
2 rected, including—

3 “(i) nominating candidates for elec-  
4 tion as directors of those issuers; or

5 “(ii) making shareholder proposals  
6 pursuant to that section; and

7 “(D) any labor organization, as defined in  
8 section 2 of the National Labor Relations Act  
9 (29 U.S.C. 152), or pension fund affiliated with  
10 a labor organization.

11 “(b) REQUIREMENTS.—

12 “(1) RULES.—Not later than 1 year after the  
13 date of enactment of the Mind Your Own Business  
14 Act of 2021, the Commission shall, by rule, direct  
15 the national securities exchanges and national secu-  
16 rities associations to prohibit the listing of any secu-  
17 rity of any covered company that is not in compli-  
18 ance with the requirements of this section.

19 “(2) ISSUER REQUIREMENTS.—The rules issued  
20 under paragraph (1) shall require each issuer, to the  
21 maximum extent permitted by State law, in the arti-  
22 cles of incorporation or bylaws of the issuer, to pro-  
23 vide, with respect to any covered claim, that any cor-  
24 porate defendant with respect to the issuer that is  
25 named as a defendant in the covered claim shall—

1           “(A) be bound by the presumptions estab-  
2           lished under subsection (c) with respect to any  
3           factual representation made in connection with  
4           the covered claim, including any factual rep-  
5           resentation relating to whether a claim asserted  
6           is a covered claim;

7           “(B) have the burden of proof with respect  
8           to any determination of independent business  
9           judgment;

10           “(C) if the claimant obtains a judgment on  
11           the merits in the covered claim, be jointly and  
12           severally liable for money damages to the claim-  
13           ant in an amount that is not less than the  
14           greater of—

15                   “(i) treble damages; or

16                   “(ii) 2 times the total compensation  
17                   paid by the issuer to all directors of the  
18                   issuer for the year in which the primary  
19                   action alleged in the covered claim sub-  
20                   stantially occurred, which shall include the  
21                   market value of all securities issued as  
22                   compensation to those directors in that  
23                   year;

24           “(D) if the claimant obtains all or some of  
25           the relief sought in the covered claim, whether

1 by court order, settlement, voluntary change in  
2 the conduct of the defendant, or otherwise, re-  
3 imburse the claimant for the greatest amount  
4 permitted by law with respect to all fees, costs,  
5 and expenses of every kind and description (in-  
6 cluding all reasonable attorney's fees and other  
7 litigation expenses) that the claimant may ob-  
8 tain in connection with the covered claim; and

9 “(E) not be indemnified by the issuer for  
10 any liability, loss (including attorney's fees,  
11 judgments, fines, or amounts paid in settle-  
12 ment) actually and reasonably incurred or suf-  
13 fered in connection with the covered claim.

14 “(c) PRESUMPTIONS.—For the purposes of this sec-  
15 tion, the following presumptions shall apply with respect  
16 to any covered claim, including with respect to any factual  
17 representation relating to whether a claim asserted is a  
18 covered claim:

19 “(1) PECUNIARY INTEREST.—There shall be a  
20 presumption that the pecuniary interest of an issuer,  
21 which shall include the best interest of the issuer to  
22 the extent that such interest is substantially similar  
23 to the pecuniary interest of the issuer, does not in-  
24 clude—

1           “(A) the morale of, or ability of the issuer  
2           to hire or retain, supervisory employees in gen-  
3           eral;

4           “(B) the diversity of the board of direc-  
5           tors, management, or workforce in general with  
6           respect to any characteristic protected by sec-  
7           tion 703 of the Civil Rights Act of 1964 (42  
8           2000e-2);

9           “(C) the public relations, image, value of  
10          marketing, or coverage by the news media of  
11          the issuer; or

12          “(D) any financial benefit or reduction in  
13          cost, including the cost of capital to the issuer,  
14          to the extent the pecuniary benefit of or to such  
15          benefit or reduction in cost is caused by the—

16                 “(i) investment in the securities of the  
17                 issuer by a non-pecuniary investment enti-  
18                 ty; or

19                 “(ii) inclusion of the securities of the  
20                 issuer in indexes created by index pro-  
21                 viders that select those indexes on a pri-  
22                 marily non-pecuniary basis or that include  
23                 such securities in any index on a primarily  
24                 non-pecuniary basis.

1           “(2) DEMAND EXCUSED.—For the purpose of  
2 determining whether demand is excused with respect  
3 to a covered claim, there shall be a presumption that  
4 a director is not independent if the director is em-  
5 ployed, controlled, or nominated by, or otherwise has  
6 a history of affiliation with a non-pecuniary invest-  
7 ment entity or any affiliate of a non-pecuniary in-  
8 vestment entity.

9           “(d) RULES OF CONSTRUCTION.—Nothing in this  
10 section may be construed—

11           “(1) to limit the exercise of religion, as defined  
12 in section 5 of the Religious Freedom Restoration  
13 Act of 1993 (42 U.S.C. 2000bb–2) of any issuer or  
14 any director, officer, or affiliate of an issuer; or

15           “(2) as establishing a fiduciary duty by any  
16 corporate defendant or corporate actor.”.